***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

Orig. with affidavit of mailing

# 74-1451

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*To be argued by*
STEPHEN M. BEHAR

P/S

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-1451**

UNITED STATES OF AMERICA,
*Appellee,*

*—against—*

JOHN MATTHEW BOSTON and
ERNEST MOORE,
*Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

## BRIEF FOR THE APPELLEE

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UNITED STATES OF AMERICA,

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*Appellants.*

## BRIEF FOR THE APPELLEE

### Preliminary Statement

John Matthew Boston and Ernest Moore appeal from a judgment of conviction of the United States District Court for the Eastern District of New York (Costantino, *J.*), entered April 5, 1974. The judgment followed a jury verdict of guilty on Counts 1 and 2 of an indictment charging them with violations of 18 U.S.C., § 2113(a) (bank robbery) and 18 U.S.C., § 2113(d) (bank robbery with a deadly weapon), respectively. Appellants were each sentenced to twenty years imprisonment on each count, sentences to run concurrently. Appellants are presently serving their sentences.

The indictment returned June 17, 1971 charged Boston, Moore and co-defendant Daniel Washington in Counts 1 and 2 with armed bank robbery and in Count 5 with conspiracy to commit bank robbery (18 U.S.C. § 371); Counts 3 and 4 charged co-defendant Stephanie Baker with receiving bank robbery proceeds (18 U.S.C. § 2113(c)) and with being an accessory after the fact to armed bank robbery (18 U.S.C. § 2113(a)(d) and § 3). On September 23, 1971, following a six day suppression hearing before Judge

Rayfiel,* Boston pled guilty to Counts 2 and 5, Washington pled guilty to Count 1 and Baker pled guilty to a superseding information charging her with the misdemeanor of possession of robbery proceeds. Baker was immediately sentenced to an eighteen month period of probation. On December 3, 1971, Boston was sentenced to twenty years imprisonment and Washington to twelve years imprisonment.**

On January 7, 1972, by letter to Judge Rayfiel, appellant Boston sought to vacate the judgment of conviction and to withdraw his plea of guilty. He alleged, *inter alia,* that he had been denied effective assistance of counsel and as a result had involuntarily pleaded guilty to the robbery in an effort to help his sister, Stephanie Baker, who was represented by the same attorney during the suppression hearing. After an extensive hearing, Judge Rayfiel denied the petition on January 23, 1973. On appeal (Docket No. 73-1145), the Government acknowledged that a potential conflict did exist as a result of the joint representation and in view of the testimony of an Assistant United States Attorney, to the effect that Stephanie Baker would not have been permitted to plead guilty to a misdemeanor charge unless Boston pled guilty to Counts 2 and 5 of the indictment, the Government did not oppose a reversal of the judgment of conviction and a remand to the District Court with the direction that Boston be permitted to withdraw

* At the conclusion of the omnibus hearing, Judge Rayfiel ruled that the pre-trial photographic identification of Boston was not impermissibly suggestive (Transcript of September 14, 1971, pages 254-55), and that probable cause existed for Boston's arrest (Transcript of September 15, 1971, page 412. Appellant Moore's motions to suppress were of course not before Judge Rayfiel because at the time of the initial hearing appellant Moore had not yet been arrested. Judge Costantino apparently felt that an entirely new hearing should be conducted because of the question of possible conflict of interest which was raised in Boston's successful petition to set aside his earlier conviction.

** On March 28, 1972, Washington's sentence was reduced to an indeterminant period of treatment pursuant to Title 18, United States Code, Section 5010(b) (Youth Corrections Act).

his plea. On June 6, 1973, this Court reversed and remanded to the District Court. *Boston* v. *United States*, 486 F.2d 1393 (2d Cir. 1973).

## Statement of Facts

The evidence at trial consisted of the testimony of two bank employees who described the ten minute robbery and identified appellants Boston and Moore. Several agents of the Federal Bureau of Investigation offered testimony describing their investigation following the robbery, which resulted in the arrests of appellant Boston and co-defendant Washington and the recovery of approximately $80,000 of the proceeds, including bait money, from Boston's apartment. Special Agent Jones also testified concerning Boston's admission of the crime and Special Agent Campbell described the discovery of a latent fingerprint on a bank money strap which, through expert testimony, was shown to be that of appellant Boston. Finally, David Moore, the brother of appellant Moore, testified for the Government and admitted that he had supplied the getaway car to appellants. Appellants offered no evidence in their defense.

For purposes of this appeal, the evidence may be summarized as follows:

### The Robbery

At approximately 9:20 A.M. on the morning of June 2, 1971, appellants Boston and Moore entered the Baisley Park Branch of the National Bank of North America in Queens, New York, followed closely by co-defendant Daniel Washington. As the three entered the bank they were noticed immediately by bank guard, John Jackson (984, 992).* Moore immediately drew his pistol and approached

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* Where appropriate, page references are to the testimony of both the hearing and trial. The hearing is transcribed at pages 1-956; the transcript of the trial begins at page 957. Due to an error in pagination, page numbers 342 through 508 were not utilized.

Jackson, putting the gun to the bank guard's head. Boston vaulted the tellers' counter as Washington leveled a shotgun at the bank customers and employees, warning them to "look natural" (985-86, 988-89).

Boston traveled from one teller's station to another, scooping up cash. Apparently dissatisfied with the proceeds, he demanded to know the location of the "reserve cash" (990, 1061). Moore then forced the assistant manager, George Intellisano, to accompany him to the vault area (990). The assistant manager, because of his nervousness, was unable to open the vault (788, 1062). Boston then left the vault area, returned to the bank floor and demanded that Mr. Joseph Dente, the branch manager, identify himself (991, 1062). Dente complied and was ordered to the vault area by Boston (992, 1063). As Dente approached the vault area, Mr. Intellisano succeeded in opening the vault (1063).

As Moore and Boston started removing the money from the vault, Dente was warned that if he did not stop staring at them, he would be shot. Appellants were spending so much time in the vault room that Washington pleaded with them to "hurry up" (993). When appellants finished filling their sacks they walked Dente back to his desk with a gun at his back (1066). Appellants then left the bank, each with a gun in one hand and a cloth sack in the other (933). With his shotgun poised, Washington backed out of the bank after the appellants (993).*

Appellants stole in excess of $185,000 in federally insured funds (1068-69), including $1000 in twenty dollar bills whose serial numbers had been recorded by bank offi-

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* The robbery lasted approximately ten minutes (33, 786). Jackson had observed Moore for three to four minutes, a good part of which time Moore was actually touching Jackson while searching him (156). Jackson observed Boston for some five minutes, by turning his head towards him when necessary; he stood within two feet of Boston when Boston passed right by him (159). Dente had observed both appellants for some three to five minutes while all were confined in the close quarters of the vault room (33).

cials before being placed in the vault as "bait money" (1071-74, 1152).

After leaving the bank, the robbers crossed Rockaway Boulevard and entered a green and black Buick and sped off.* Jackson, the unarmed bank guard, followed them out of the bank and, in his own car, chased the trio for several blocks before losing them. During the chase Jackson was able to carefully observe the car and to record its license number (993-95).

## The Investigation

(1)

Jackson returned to the bank (996) where he and Dente were interviewed by uniformed New York City Police Officers, New York City Detectives and finally, Special Agents of the Federal Bureau of Investigation (105, 997).** Jackson described the getaway car and, like Dente and the other bank employees and customers, furnished descriptions of the three bank robbers (709-711, 997, 1081).

A composite description of each of the bank robbers was then broadcast to other FBI agents working on this case. Also broadcast was the complete description of the getaway car (711, 524).

Later that day, the getaway car was found in a parking lot located at the intersection of Loring Avenue and Eldert Street, Queens, New York. Two pairs of FBI agents established surveillance of the Buick by parking their cars in a lot across the street (275-302, 1304-05).

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* The getaway car had been stolen several days earlier by Moore's brother, David (1139-41).

** There were between twenty-five and thirty law enforcement agents in the bank after the robbery; Jackson alone was interviewed by eight of them (246-47).

Approximately twelve hours later, at 2:30 in the morning of June 3, 1972, a gypsy taxicab approached the area under the watchful eyes of the surveillance teams. The cab stopped between the surveillance vehicles and the getaway car and the driver, appellant Boston, got out. Boston walked across the street into the parking lot occupied by the FBI vehicles. Boston "stood around there for a while" (307, 1306), and having apparently satisfied himself that the area was deserted, he returned to the cab. Meanwhile, Washington had exited the gypsy cab while awaiting Boston's return (277, 1306). As Boston got into the cab, Washington ran over to the Buick. Washington went to the passenger side of the vehicle, opened the door, and leaned in for a few moments (278, 1306). Washington then closed the door, walked to rear of the vehicle, stooped over and was momentarily lost from the agents' view (278, 1306). Washington then went to the front of the Buick and threw something at the windshield (279-80, 1307). He then ran back to the gypsy cab and reentered it (280, 1307). Boston turned on the headlights. He then turned off the headlights, and proceeded down the block and executed a U-turn. After the cab had proceeded fifty to seventy-five yards (308), the agents' cars blocked the cab and forced it to stop (280, 1307).

Agent DiBona and his partner went to the driver's door of the cab and told Boston to get out. DiBona asked Boston his name and Boston replied, "Sam Grayhart" (1307). Boston was asked for written identification and he offered his wallet, which contained a New York State driver's license in the name John Boston. Boston then admitted that John Boston was his true name. Boston and Washington were then placed under arrest (281, 1307-08).

The agents searched Boston and found $1,190 in cash (282, 1308). Boston was placed in one of the FBI cars,

advised of his rights and informed that he was being arrested for the subject bank robbery (290-91). Agent Jones then transported Boston to the FBI offices in Manhattan. During the trip, Jones informed Boston that he was being arrested for the subject bank robbery and advised him of his rights for a second time (513-14, 1245). Upon arrival at FBI headquarters, Jones presented Boston with an FBI "Interrogation Advise of Rights" form. Boston read the form and acknowledged that he understood it. Boston assured the agents that he would answer questions, but refused to sign a written waiver (517-18, 1246). Boston then denied having participated in the bank robbery (519). He explained that he was driving the gypsy cab the previous day and that Danny Washington exhibited a large sum of money and hired the cab that afternoon (519). Boston drove Washington around while Washington made numerous purchases (520). He also stated that he had no objection to helping Washington spend the money (520, 1247). Boston then supplied pedigree information including the information that he was then staying at the apartment of his sister, Stephanie Baker, at 1212 Loring Avenue, Brooklyn, New York (521, 1248).

(2)

Four agents were then dispatched to Stephanie Baker's apartment (680, 1249). The agents arrived at the apartment at 7:00 A.M. Special Agent James Murphy knocked on the door and identified the team of agents to Miss Baker (680, 1211-13). Baker opened the door and admitted the agents who did not have their guns drawn (318). Murphy explained to her that John Boston had been arrested in connection with a bank robbery and because Boston had spent time at that apartment, the agents wished to conduct a search (322, 1214). Murphy and Baker walked into the kitchen adjoining the vestibule and Murphy gave Baker a FBI consent to search form. Murphy explained the form

to Baker, who read it and said she understood it before signing it (323, 682-83, 1215).

Baker then led the agents to the rear bedroom of the apartment. She removed two suitcases from under the bed and placed them on the bed where they were opened by Agent Murphy (1215-16). The suitcases contained $80,921 (1219). An additional $1,180 was also found in the apartment (1219). Included in the currency discovered was $800 in bait money (1071, 1220-23). The search also uncovered three "National Bank of North America" money wrappers, unexpended cartridges from a .45 caliber pistol and a 12 gauge shotgun (1075, 1228, 1235-36)* and a portion of a money strap used by the victim bank for storing currency in the vault.**

(3)

While Boston was undergoing routine processing at FBI headquarters, the results of the search were related to him (521, 1249). Confronted with this bad news, Boston then admitted his participation in the crime, but refused to identify the third participant (522, 1250). The interview was then terminated and Boston was transported to the Eastern District of New York for arraignment (522, 1250).

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* Although Judge Costantino had previously denied Boston's motion to suppress the items seized during the search, based on his finding that Baker had knowingly, intentionally and voluntarily consented to the search (950), at trial, the court did suppress the two cartridges without giving the Government the opportunity to reiterate the hearing evidence that Washington carried a shotgun during the robbery and that Boston carried a pistol and that these two had been arrested in each other's company hours before.

** Boston's fingerprint was later discovered on this money strap (1297).

Prior to arraignment, Washington and then Boston, were interviewed by an Assistant United States Attorney. Boston was again advised of his rights. He admitted his participation in the bank robbery, but refused to identify Moore (829-830). Washington and Boston were then arraigned upon the complaint and a "John Doe" arrest warrant was issued for Moore.* Later that day, an arrest warrant was issued for Stephanie Baker (555).

(4)

With the arrests of Boston, Washington and Baker, the investigation centered on the identification and apprehension of the third bank robber. The FBI quickly developed appellant Ernest Moore as a suspect and on June 7, 1971, Agent Jones received information that Moore was hiding in Apartment 3C at 441 Alabama Avenue, Brooklyn, New York (723-27). Jones and several other agents went to the apartment. They noticed lights on in the apartment, heard voices within, but received no response to their knocking on the apartment door (640-45). The agents identified themselves and announced their intent to arrest Moore (640). Finally, one of the agents entered through a fire escape window and opened the door for the other agents (647-8). While conducting a search of the apartment for Moore, the agents discovered two (2) New York State license plates on the kitchen table. A bill of sale for a Cadillac automobile and a rent receipt were found on top of a bedroom bureau (663-64). These items were seized.** The agents also discovered that a radio set in the apartment had been left with the volume turned on (669).

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* On June 17, 1971, the warrant was revised and reissued with Moore's full and correct name.

** The seized items were suppressed by Judge Costantino following the hearing. The Court reasoned that the agents ignored an opportunity to obtain a search warrant before entering the apartment (946).

Appellant Moore was eventually arrested by the New York City Police Department on July 13, 1972. On the following day, Moore was transported to FBI headquarters for interviewing and processing. Prior to any questioning, Moore signed an FBI Advice of Rights and Waiver form. During the interview with Agent Jones, Moore admitted knowing Boston and Washington and made certain other admissions before stating that he would not discuss the bank robbery until he consulted with his lawyer. The interview then ended * (325-32).

## Pre-trial Identifications

(1)

Two days after the robbery, the *New York Daily News* published the story of the arrest of Boston and Washington. Boston's "mug shot" accompanied the article (584).

A bank secretary brought a copy of the newspaper article to work and showed the article to Mr. Dente. She did not recall showing the article to the bank guard, John Jackson. Indeed, Jackson testified that he had never seen the newspaper article nor discussed it with anyone (87, 150).

(2)

On August 4, 1971, Agent Jones went to the bank to see Joseph Dente. Jones asked Dente if he would look at some photographs (587). Jones then showed Dente a group of eight photographs making sure he only observed the front of each picture ** (39-41). Dente carefully examined the spread of photographs given to him before selecting Boston's picture as that of the bank robber who jumped over the tellers' counter (110).

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* Nevertheless, Judge Costantino suppressed all of appellant Moore's admissions (947-49).

** The two photographic spreads employed during the pre-trial investigation have been transmitted to the Clerk of this Court.

On August 16, 1971, Agent Jones again visited the bank. This time he asked Mr. Jackson to look at the group of pictures and see if he recognized anyone (540-41). Boston's picture was neither the first nor the last in the spread and Jones said nothing else to Jackson about the photos (185-88). Jackson took "a good long look at" the photos in the spread and selected Boston's photo, saying, "This is the man, this the one that jumped the counter" (186-87).

Following the arrest of appellant Moore, on January 2, 1973, Agent Jones visited Jackson at the Linden Boulevard branch of the National Bank of North America (159, 539). Again, Jones asked Jackson to look at a group of photographs, this time nine in number.* Again the photographs were handed to Jackson face up and he was only asked to see if there was anybody in the group he recognized (539). Jones did not suggest nor indicate in any manner which picture Jackson should select (228). Jackson had no trouble in selecting appellant Moore's photograph (245).

On January 9, 1973, Agent Jones called on Mr. Dente at the College Point branch of the bank (132). Dente was asked to look through the group of nine photographs and see if he recognized anyone depicted therein. Dente was handed the photos face up and he did not turn them over prior to selecting appellant Moore's photo (42, 543).

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* Four of the photographs had been included in prior photo-spreads shown to Jackson.

# ARGUMENT

## POINT I

### There was probable cause for appellant Boston's arrest.

Appellant Boston first challenges the existence of probable cause to justify his arrest by the FBI on the morning after the bank robbery. "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that, an offense has been or is being committed." *Brinegar* v. *United States,* 338 U.S. 160, 175-76 (1949), quoting *Carroll* v. *United States,* 267 U.S. 132, 162 (1925). *Accord, Draper* v. *United States,* 358 U.S. 307, 313 (1959).

The FBI succeeded in locating the getaway car less than six hours after the robbery. Surveillance was immediately initiated from an adjacent lot and the vehicle was watched constantly. In the meantime, detailed descriptions of the robbers had been relayed to the agents at the surveillance site. A composite description of one robber (Washington—the man with the shotgun) was of a male negro in his early to mid-twenties, weighing approximately one hundred fifty-five pounds, between 5′ 7″ and 5′ 9″ tall with a black "afro" hair style; another robber (Boston—the one who jumped the teller's counter) was described as a male negro, older, taller and heavier than Washington, with a similar black "afro" hair style.

With these descriptions firmly in mind and with their sole responsibility being the observation of the getaway car, the surveillance agents waited in anticipation of the possible

return of the robbers. At about 2:30 A.M., a series of events began to occur which necessitated the decision of the agents to stop the "cabbie" and his "fare." As the gypsy cab came to a stop, Boston left the vehicle from the driver's seat, leaving the "fare," Washington, alone in the car. Boston walked approximately 100 feet from the car and stood still for awhile before returning to the cab, apparently satisfied with what he had seen—or not seen. By the time Boston returned to the cab, Washington was outside the vehicle waiting for him. Washington then ran to the getaway car. He first opened a door and leaned in the vehicle. He then closed the door and walked behind the vehicle. He bent down, picked up an object and threw it at the windshield and then ran toward the waiting gypsy cab. As the agents watched, Boston turned the cab's lights on and then off; he then executed a U-turn and proceeded approximately fifty yards before being trapped by the FBI. When stopped, Boston identified himself as Greyhart, but then, when requested, produced his driver's license which bore his true name, John Matthew Boston.

In the face of this evidence, Boston now argues that probable cause did not exist to justify his arrest. A common sense reading of the evidence belies such an argument. Appellant concedes that the agents acted properly in making an investigatory stop. *Terry* v. *Ohio,* 392 U.S. 1 (1968). (Appellant Boston's brief, page 25.) Indeed, the highly suspicious, furtive actions of Boston and Washington and Washington's act of violence demanded such a response from the surveilling agents. Nevertheless appellant persists in his argument that actions of Boston could have just as easily been interpreted as those of an innocent cab driver. Again, common sense does not permit such an interpretation. When Boston arrived at the scene, this "innocent cab driver" abandoned his cab and rider and scouted the surrounding area. He returned to the cab and Washington then went directly to the getaway car. Rather than demonstrating an intent of mere vandalism, Washington's actions at this point say much more. He examined the

vehicle, inside and out and then, while his "cabbie" waited, he picked up an object and hurled it at the windshield. Evidencing excellent teamwork, Boston started the cab and turned on the lights as the retreating Washington joined him in the cab. Exercising better judgment, Boston then turned out the headlights, "accommodating his passenger", and made a U-turn and drove off. Appellant Boston insists that "[t]he only reasonable inferences to be drawn from appellant's observed conduct was that of a cabdriver earning a living." (Appellant Boston's brief, page 26). Fortunately, the FBI agents did not draw that inference. They stopped the cab and were then confronted with two men fitting the descriptions of the bank robbers. These events, coupled with Boston's unsuccessful attempt to conceal his identity, fully justified the arrest of Boston and Washington.* *United States ex rel. Catanzaro* v. *Mancusi,* 404 F.2d 296 (2d Cir. 1968), *cert. denied,* 397 U.S. 942 (1970).

An additional fact, not considered by the District Court, puts the issue forever to rest. Before Boston and Washington appeared on the scene, the surveilling agents had been informed that a confidential source had identified Boston and Washington as two of the bank robbers. Despite the fact that Judge Costantino found probable cause, "independent of any statements made by an unnamed informant," this Court may consider this significant added fact in weighing the existence of probable cause. (Appellee's Appendix, page A5.) (There is no dispute that the agents had in fact received this information.) Once the agents were armed with the name "Boston" as a prime suspect in the robbery, the arrest of appellant was mandated by their discovery that the man they stopped was in fact John Boston.

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* It was not until Boston and Washington were actually arrested that the agents frisked the suspects and administered their *Miranda* warnings.

Appellant argues, however, that Judge Costantino could not have considered the informant's tip because *Aguilar* v. *Texas,* 378 U.S. 108 (1964) "requires some evidence establishing the informant's reliability and that of his information." (Appellant Boston's brief, page 21, note.) *Aguilar* is clearly inapplicable. Judge Costantino clearly did not have to rely *solely* on the confidential information. As Judge Friendly has recently observed:

> The lesson we draw from all this is that *Aguilar* applies with full rigor only when the search warrant or the arrest depends solely on the informer's tip. When a tip not meeting the *Aguilar* test has generated police investigation and this has developed significant corroboration or other *'probative indications of criminal activity* along the lines suggested by the informant,' see Rebell, The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards, 81 Yale L.J. 703, 715-17 (1972), the tip, even though not qualifying under *Aguiliar,* may be used to give such additional color as is needed to elevate the information acquired by police observation above the floor required for probable cause.

*United States* v. *Canieso,* 470 F.2d 1224, 1229-31 (2d Cir. 1972). See *Draper* v. *United States,* 358 U.S. 307 (1959).

## POINT II

### The search of 1212 Loring Avenue was not in violation of the Fourth Amendment because consent to search was freely and voluntarily given.

"[A] search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 222 (1973); *cf. United States* v. *Burgos,* 269 F.2d 763 (2d Cir. 1959), *cert. denied,* 362 U.S. 942 (1960).

The test for voluntariness "is a question of fact to be determined from the totality of all the circumstances", *Schneckloth* v. *Bustamonte, supra* at 227. An examination of "the totality of the circumstances" in the instant case will clearly show that Stephanie Baker knowingly and voluntarily consented to the search of her apartment.*

Baker was not in custody at the time her consent was given, nor was she suddenly confronted with armed men bursting into her apartment. *United States* v. *Mapp*, 476 F.2d 67 (2d Cir. 1973). The agents knocked on her door, identified themselves and were then admitted by Baker into the apartment. None of the agents had their guns drawn and only one agent approached Baker to talk to her. The other agents remained together near the door. Agent Murphy explained that Boston had been arrested for bank robbery and that they would like permission to search the apartment. Baker then led Agent Murphy into the kitchen where he gave her an FBI consent to search form. The agent explained the form to her and assured her that she had a right to refuse the search. Baker read the consent form; said she understood it and then signed it.**

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* Appellant does not contest the fact that Baker could validly consent to a search of the apartment. See, e.g., *United States* v. *Mojica*, 442 F.2d 920 (2d Cir. 1971); *United States* v. *Cataldo*, 433 F.2d 38 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971).

** Judge Costantino rejected Stephanie Baker's testimony at the hearing. (Appellee's Appendix page A. 6.) Stephanie Baker testified that her apartment was searched as soon as she opened the door for the agents, that the agents stayed for several hours, that before leaving they gave her an inventory to sign, that the inventory was the only thing she signed, and that she never signed "any papers that permited them to search the apartment" (894-96). On cross-examination, Miss Baker acknowledged that she could read at the time of the search but she insisted that she did not sign the consent form (897-898). She was then presented with two exhibits which were covered except for the handwritten words "Stephanie Baker". She admitted that her signature appeared to be on both exhibits (898-99). One exhibit was the consent to search form and the other was the inventory (899).

Appellant Boston alleges that Baker signed the form as a reaction to the coercive nature of her situation and that her consent was therefore given in submission to assertive authority. Although the hour was early, it was daylight on June 3rd at 7:00 A.M. in the morning. Any initial apprehension on Baker's part at finding four FBI agents at her door was surely dissipated by Murphy's subsequent behavior.

This was not a submission to authority. There was no false claim by Agent Murphy to possession of a search warrant nor a threat to obtain one. *Cf Bumper* v. *North Carolina,* 391 U.S. 543 (1968). There are no allegations of trickery or deception, nor did the agents threaten to search regardless of Baker's decision on consent. *United States ex rel. Lundergan* v. *McMann,* 417 F.2d 519 (2d Cir. 1969). Indeed, she was informed of her right to refuse to consent, even though this was not required by law. *Schenkloth* v. *Bustamonte, supra; United States ex rel. Combs* v. *LaVallee,* 417 F.2d 523 (2d Cir. 1969), *cert. denied,* 397 U.S. 1002 (1970).

After reviewing the conflicting testimony at Boston's suppression hearing, Judge Costantino found that Baker had knowingly, intentionally and vouuntarily consented to the search. "[W]hether or not such consent has been given is primarily a question of fact, better left to the trial judge, who must pass upon the credibility of the witnesses." *United States* v. *Callahan,* 439 F.2d 852, 861 (2d Cir.), *cert. denied,* 404 U.S. 826 (1971). *Accord, United States* v. *Bracer,* 342 F.2d 522 (2d Cir.), *cert. denied,* 382 U.S. 954 (1965).

The government having established a knowing, intelligent and voluntary consent to search need not respond to appellant Boston's futile argument that, absent exigent circumstances, a warrant was nevertheless required to justify the search. "In *Katz* v. *United States,* 389 U.S. at 358, and more recently in *Vale* v. *Louisiana,* 399 U.S. 30, 35 we [the

Supreme Court] recognized that a search authorized by consent is wholly valid." *Schneckloth, supra* at 222. Indeed, as this Court stated in *United States* v. *Malo,* 417 F.2d 1242, 1246 (2d Cir. 1969), *cert. denied,* 397 U.S. 995 (1970): "We cannot agree with the defendant that the government is required to obtain a search warrant in order to search premises where the person having the right to control use of the premises freely consents to the search."

Understandably, appellant is unable to cite a single case which would impose upon the government the burden of proving anything more than a valid consent as the proper basis for a warrantless search. "A search to which an individual consents meets Fourth Amendment requirements." *Katz* v. *United States,* 389 U.S. 347, 358 n. 22 (1967).

## POINT III

### The in-court identifications of appellants Boston and Moore were properly received at trial.

### 1. The Identification of Boston.

The pre-trial identifications of Boston by Jackson and Dente were not impermissibly suggestive. In determining the admissibility of their in-court identifications the initial inquiry must of course focus on the possibility that the pre-trial identification procedure was somehow suggestive.

The photographic identification of Boston by both witnesses resulted from the use of an exceptionally fair photo spread. Understandably, there is no claim on this appeal that the Boston spread itself was inherently suggestive or that the manner of presentation to the witnesses influenced their selections.*

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* In presenting the photographs to Dente and Jackson, Agent Jones gave no preliminary indication as to whether the spread

[Footnote continued on following page]

Appellant Boston's only apparent reason for urging the suppression of the in-court identifications arises from the unfortunate publication of a newspaper article about the robbery which included the arrest photograph of Boston. The article was shown by a bank employee to Joseph Dente two days after the robbery and appellant Boston now argues that this inadvertent viewing was highly suggestive and therefore the in-court identification should have been suppressed.* Ignoring the testimony of Dente himself to the effect that the viewing of the newspaper picture did not influence his selection of Boston's picture from the photo spread, Boston argues essentially that the newspaper viewing was impermissibly suggestive. It is difficult to understand how Dente's viewing of the picture creates a substantial likelihood of misidentification since it came so closely after the robbery at a time when the witness' recollection was obviously most vivid and detailed. Indeed, Dente and Jackson were able to view all three robbers for a substantial period of time during the commission of the crime. By the same token, the viewing of the newspaper article preceded the in-court identification at trial by approximately 2½ years, and it is difficult to understand how during that period of time the newspaper

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contained a picture of a suspect. Without prompting, subtle or otherwise, Agent Jones merely handed the eight photographs to each witness while taking particular care that the pictures were not turned over prior to selection. The pictures were of the same general quality and they showed black men of approximately the same age, weight and hair style. (The Boston and Moore spreads have been transmitted to the Clerk of the Court.)

* The other identifying witness, bank guard, John Jackson, testified that he never saw the newspaper article and the bank employee who brought the paper to work testified that she did not specifically recall showing the article to Jackson but, that she had shown it to several employees and she therefore assumed that Jackson was among them. Expanding his argument, appellant has little difficulty concluding in the face of this testimony that Jackson himself saw the picture of Boston in the morning newspaper.

picture of Boston could have displaced Dente's recollection of Boston during the commission of the crime as the basis for an in-court identification.

## 2. The Identification of Moore.

Agent Jones' presentation of the Moore photo spread to the bank witnesses was again a model of fairness.*

The photographic identifications of Moore took place approximately 19 months after the robbery and approximately 17 months after Dente and Jackson were shown the Boston spread. Three photographs from the Boston spread and one photograph from the Washington spread were included in the Moore spread. Appellant Moore's contention that because of the duplication of photos, the spread was effectively reduced to five photos is illogical and misleading. In pursuing his argument appellant neither demonstrates how this would be suggestive of misidentification nor does he advance authority for the proposition that a five picture spread is *per se* impermissibly suggestive. See *United States* v. *Bennett,* 409 F.2d 888, 898 (2d Cir.), *cert. denied,* 396 U.S. 852 (1969). At the very least the repetition of four photographs would seem to be suggestive only in the sense that the witnesses might be pressured to select one of the faces repeatedly shown them by the FBI. The photograph of Moore was shown only once and immediately selected. The finding of the District Court that the "photographic identifications were not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification" should not be disturbed (Appellee's Appendix, pages A7-A8).

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* Appellant Moore claims that Agent Jones announced to Mr. Dente that a picture of the bank robber was included in the spread (138-41) (Appellant Moore's brief, page 4.) An examination of the record clearly shows that Dente independently assumed that the bank robber's picture might be among the pictures in the spread and that Jones only asked Dente if he "recognized any of them" (140, 543).

### 3. The Opportunity to Observe.

Even assuming that the District Court had found that the pre-trial photographic procedure was in some way suggestive, the motion to suppress the in-court identifications was properly denied in view of the extraordinary opportunity that both Dente and Jackson had to observe Boston and Moore during the commission of the bank robbery. *Neil* v. *Biggers,* 409 U.S. 188 (1972); *United States ex rel. Gonzalez* v. *Zelker,* 477 F.2d 797 (2d Cir.), *cert. denied,* 414 U.S. 924 (1973).

Both witnesses utilized a substantial opportunity to view appellants during the course of this bank robbery. Dente viewed each of the appellants in a well lit bank for a period of three to five minutes. At times, especially when Boston came to take him into the vault room and while in the vault room, Dente was within arms reach of the appellants. Jackson first viewed each of the appellants as they walked on the street outside the bank moments before the robbery. Jackson then viewed the appellants in the well lit public area of the bank. Jackson saw the appellants for a third time outside the bank as they fled. Jackson saw appellant Moore for three to four minutes. While Moore was searching for Jackson's gun, they were literally nose to nose. Jackson observed Boston for approximately five minutes. At times Boston was within two feet of Jackson. The opportunity to observe by the witnesses here was clearly comparable to that enjoyed by the witnesses in *United States* v. *Fernandez* (I), 456 F.2d 638, 642 (2d Cir. 1972).

Both witnesses evidenced an exceedingly high degree of attention towards the appellants during the course of the bank robbery. Jackson, a retired police officer, was a trained observer, and Dente, the branch manager who had experienced previous bank robberies, obviously knew the importance of close observation. Jackson's presence of mind throughout the incident was illustrated by his detection of the bank robbers as they entered the bank and

by his quick action in following them and recording the license plate of the getaway car as they fled the bank. Dente's concentration on the appellants was so intense that they were compelled to warn him while in the vault room that they were going to kill him if he continued staring at them. As with the primary witness in *Gonzalez* v. *Zelker, supra* at 801, the robbers were close to the witnesses, the witnesses were not casual bystanders but victims threatened with weapons, the light was good and their attention was focused upon the robbers. The witnesses did not evidence the slightest degree of uncertainty during the pre-trial identifications or, more importantly, during the in-court identifications (952).

The length of time between the robbery and Boston's identification was in one instance eight, and in the second, ten weeks. Subsequent "in-court" identification of appellant Boston occurred only one month later, during the early September 1971 suppression hearing. Appellant Moore's identification was, of necessity, delayed for over a year while he evaded arrest. Following Moore's apprehension, the agents were investigating another bank robbery allegedly committed by Moore.*

Furthermore, the cross-examination of Jackson, Dente and the agents regarding the identifications, at both hearing and trial, consumed approximately three hundred pages of hearing and trial record. As noted in *United States ex rel. John* v. *Casscles*, 489 F.2d 20, 26 (2d Cir. 1973), "An important factor for consideration is the extent of cross-examination by defense counsel, so that all the facts concerning any possible misidentifications are before the jury." In *Casscles* the sufficiently extensive cross-examination covered more than forty pages.

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* On January 16, 1973 appellant Moore was indicted for the June 21, 1972 armed robbery of the Chemical Bank, 79 Hamilton Avenue, Brooklyn, New York.

### 4. The Lineup Question.

Appellant's final argument is entirely without merit. They claim that the Government's "failure" to conduct a pre-trial lineup somehow requires suppression of the in-court identifications. *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). First of all, neither Boston nor Moore requested a lineup and in fact Moore opposed the Government's application to place him in a lineup following his arrest in July of 1972 (260-62; 268-69). Appellant Moore attempts to gather support for his argument by urging that the Government had ample time to conduct a lineup during the year prior to trial following his arrest. What he fails to point out, however, is that in that period three psychiatric examinations were conducted, at his request, to determine his competency to stand trial. In any event, the claim that Boston and Moore should have been placed in a lineup has no bearing whatsoever on the issue of the admissibility of the in-court identifications.

## POINT IV

### Appellant Boston's confession was voluntarily given after he was fully advised of his rights.

*Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny, require that any waiver of rights be made voluntarily and knowingly. There was no violation of this standard in the instant case. No questioning of appellant Boston was attempted until he had been warned of his rights for the third time. (There is no challenge to the adequacy of the warnings.) At that time appellant stated that he understood his rights, but he refused to sign the waiver and advice of rights form.* This was not an indication

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* Boston testified during the suppression hearing that at the time of his arrest he was already familiar with the *Miranda* warnings (925).

that he did not wish to be questioned, for at the same time he assured the agents that he would answer any questions the agents asked and he then proceeded to make false exculpatory statements.

At no time did appellant state that he wished the interrogation to stop, nor did he request to have an attorney present while he was being questioned. He was obviously attempting to talk his way out of his predicament while evidencing a not uncommon reluctance to sign anything undoubtedly believing that his refusal to sign might somehow work to his eventual favor.

In any event, *Miranda* does not require that a waiver of rights be made in writing. *United States* v. *Cassino,* 467 F.2d 610 (2d Cir. 1972), *cert. denied,* 410 U.S. 928 (1973); *United States* v. *Speaks,* 453 F.2d 966 (1st Cir. 1971), *cert. denied,* 405 U.S. 1071 (1972). There is more than ample evidence in the record to support a finding that appellant by his statements voluntarily, knowingly and intelligently waived his rights.* At the suppression hearing the trial judge had substantial opportunity to view the witnesses who had been present at the time leading up to and during the confession. These same witnesses were the subjects of lengthy cross-examination by defense counsel. At the conclusion of the suppression hearing the trial judge found that: "on the basis of the demeanor of the witnesses and the testimony adduced . . . Boston had been properly advised of his *Miranda* rights" (951).

The appellant also contends that his confession was the direct result of the Government's alleged threat to prosecute his sister, Stephanie Baker. During his testimony at the

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* Appellant's position would require that the agents stop Boston from making his statement and say to him "Well if you won't sign the waiver form, will you verbally first say the words, 'I waive my right.'"

suppression hearing, Boston denied receiving his rights immediately after his arrest; he denied being warned while on route to FBI headquarters; he admitted receiving his *Miranda* warnings at FBI headquarters, but only after he was threatened with the prosecution of his sister and after he was told about the results of the search of her apartment. In essence, Boston urges that he was able to resist the coercive tactics of Agent Jones when asked to sign the waiver form, but that he was unable to withstand the pressure when he confessed his role in the bank robbery (917-19). On the other hand, the Government's evidence, obviously credited by Judge Costantino, showed that Boston received his *Miranda* warnings three times before any questioning was begun. Boston denied his participation in the crime until the results of the search of Baker's apartment were made known to him by Agent Jones. Upon being confronted with the news that evidence had been found, the appellant responded, after a moment's hesitation, "well, you got me"; he then proceeded to confess his participation in the robbery. At no time was Boston threatened with the prosecution of his sister if he did not confess, nor was he tricked, mislead or confused by the interviewing agents.

The appellant's confession was freely and voluntarily given. His confession was obviously prompted by the realization that his position was hopeless after the evidence of his crime had been found.

## POINT V

**The District Court's charge to the jury was entirely proper.**

During the District Court's charge, the jury was instructed as follows (Appellee's Appendix, page A35):

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence.
>
> However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

At the time Judge Costantino delivered this portion of his charge, he neither marshalled the evidence nor made any reference to the testimony of David Moore. Appellants now argue, however, that because the testimony of David Moore, the brother of appellant Moore, was insufficient to characterize him as an accomplice and, therefore, insufficient by itself to permit the jury to convict, that the foregoing charge in effect was an instruction to the jury that they could convict on insufficient evidence.*

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* Whether or not the testimony of David Moore was sufficient to characterize him as an accomplice is at least arguable. On direct examination David Moore admitted being arrested as an aider and abettor of the robbery and specifically that he provided his brother on the day before the robbery with the getaway vehicle. David Moore recalled also on that day observing appellant Boston wiping the getaway vehicle. Whereupon Boston explained to the

[Footnote continued on following page]

Assuming *arguendo* that the evidence was not sufficient to show David to be an accomplice in the bank robbery, appellant in any event fails to demonstrate how this instruction could have prejudiced him. The jury was instructed in several instances that they had to find appellants Boston and Moore guilty beyond a reasonable doubt. Indeed the evidence adduced at trial made this chore a relatively simple one. Whether considered an accomplice or not, David Moore did offer testimony in the Government's case linking appellants Boston and Moore with the third bank robber, Washington. And, of course, David Moore explained to the jury how the getaway vehicle was obtained and more importantly by whom. In the wake of this evidence, Judge Costantino admonished the jury that the testimony of an accomplice should be received with caution and weighed with great care. It is difficult to see how appellants can now complain that Judge Costantino's cautionary instruction prejudiced them. *Coleman* v. *United States,* 367 F.2d 388 (9th Cir. 1966).

The District Court's instruction did not, as appellants allege, advise the jury that they could convict on insufficient evidence. The jury was instructed that they had to find appellants guilty beyond a reasonable doubt and the evidence at trial permitted them to do so in short order.

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witness that he was removing fingerprints. On cross-examination, however, counsel for appellant Boston brought out the fact that an FBI report contained a statement of David Moore to the effect that he had supplied a getaway car to his brother so that it could be used in the bank robbery (1190-94). Counsel then inferred that a similar report contained David's admission that he received part of the proceeds of the bank robbery (1196).

## CONCLUSION

**The judgments of conviction should be affirmed.**

DAVID G. TRAGER,
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RAYMOND J. DEARIE,
STEPHEN M. BEHAR,
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* The United States Attorney's Office wishes to acknowledge the assistance of John Phillip Eiseman in the preparation of this brief. Mr. Eiseman is a third year law student at Hofstra University Law School.

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# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of August 19 74 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

McCarthy and Dorfman, Esqs.
1527 Franklin Avenue
~~Mineola, N. Y. 11501~~

Gustave Weiss, Esq.
1540 Broadway
~~New York, N. Y. 10036~~

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
2nd day of August 19 74

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975